



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 10, 1997

Ms. Eugenia Cano
City Attorney
City of Alvin
216 W. Sealy
Alvin, Texas 77511

OR97-0513

Dear Ms. Cano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 104365.

The City of Alvin (the "city") received a request for various records relating to Alvin Landfill Permit #1446, as well as to "[p]ayments made, or agreements with the city of Alvin or any member of council or any employee or a relative or member of counsel or City employee with Mr. Zia Qureshi and LS&R Consulting Group Inc." from September 1, 1993 to December 5, 1996. You state that some information responsive to the request has been or will be made available to the requestor, and that certain other information requested does not exist. You assert that the remainder of the information responsive to the request is excepted from disclosure pursuant to sections 552.103 and 552.104 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

Contained in the information submitted to this office and marked as Exhibit F is Plaintiff's First Original Petition in the matter of Mitchell Macha and Lee Fregeau v. The City of Alvin, Texas, cause number 96M1377, in the 149th District Court, Brazoria County, Texas. We note that the requestor is one of the named plaintiffs in this cause of action. The city has thus met

its burden in establishing that litigation is pending. Upon review of the information contained in Exhibits C and D, we conclude this information is related to the pending litigation and therefore may be withheld from disclosure under section 552.103.¹

We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

With regard to the information contained in Exhibit E, we note the city, in response to an earlier Open Records Act request, has previously sought a decision from this office as to whether this information could be withheld from disclosure. This office determined that the city waived its right to assert the protection of sections 552.103 and 552.104 of the Government Code for the portion of the requested information contained in Exhibit E. *See* OR96-2197 (1996). The city subsequently brought suit against this office which is currently pending in the 201st Judicial District Court of Travis County, Texas, challenging that decision. It is the policy of this office not to address issues that are being considered in pending litigation. Accordingly, we decline to rule on the information contained in Exhibit E and will allow the trial court to resolve the issue of whether these records must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 104365

Enclosures: Submitted documents

cc: Mr. Lee Fregeau
Route 1, Box 371
Alvin, Texas 77511
(w/o enclosures)

¹As we resolve your request under section 552.103, we need not address your argument under section 552.104.